No. 90-1058

FILED
DEC 23 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

J. C. Kincheloe, Superintendent,
Oregon State Penitentiary,
Petitioner,

v.

Jose Tamayo-Reyes,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT

Steven T. Wax
Federal Public Defender
851 S.W. Sixth Avenue, Suite 1375
Portland, Oregon 97204
(503) 326-2123
Attorney for Respondent

UNITED COPY

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	9
ARGUMENT	11
I. FACT DEVELOPMENT PROCEEDINGS ARE AN INTEGRAL PART OF THE HABEAS CORPUS PROCESS	11
A. Background	11
B. The Statutory Scheme Supports an Evidentiary Hearing in this Case	12
C. The Caselaw Supports the Decision of the Ninth Circuit in Requiring an Evidentiary Hearing in this Case	15
D. Conclusion	17
II. CONGRESS AND THE COURTS HAVE CAREFULLY PROTECTED STATE INTERESTS IN THE FACT DEVELOPMENT PROCESS	17
A. The Exhaustion Doctrine	17
B. The *Townsend* Holding	20
C. § 2254(d)—The Presumption of Correctness	21
D. Conclusion	22
III. CONGRESS HAS ADOPTED THE STANDARD SET OUT IN *TOWNSEND*	23
A. Congress Is Presumed to Know the Law	23
B. The Relationship Between *Townsend* and 28 U.S.C. 2241-54	24
1. The state's reliance on H.R. Rep. No. 1384, 88th Cong., 2d Sess. (1964) is misplaced	26

TABLE OF CONTENTS—Continued

Page

2. The state's reliance on the legislative history discussion in *McCleskey v. Zant* is misplaced 28

IV. THE CAUSE AND PREJUDICE TEST IS INAPPLICABLE TO THE QUESTION OF WHEN AN EVIDENTIARY HEARING SHOULD BE HELD 30

A. The Cause and Prejudice Test Is Only Applicable When an Adequate and Independent Ground Exists to Deny Federal Review 30

1. The foundation of the test 30

2. *Coleman v. Thompson* 32

3. The state pushes its reliance on *Brown v. Allen* too far 34

4. Conclusion 36

B. The Federal/State Interests at Stake in this Case 37

1. The Integrity of the Federal Judicial Process 37

2. The procedural default rule would upset the statutory scheme adopted by Congress in 1966 and 1976 40

3. Application of the cause and prejudice standard would virtually eliminate federal habeas corpus review in many situations 40

4. A change in the law is not needed to limit federal evidentiary hearings 41

5. Federal evidentiary hearings involve a number of issues which cannot be considered under the cause and prejudice rubric 42

TABLE OF CONTENTS—Continued

Page

6. Just punishment is important 43

7. Habeas corpus remains an important remedy for review of constitutional violations 44

8. The cause and prejudice standard would discourage the states from establishing effective post-conviction procedures 45

V. THE JUDGMENT OF THE NINTH CIRCUIT SHOULD BE AFFIRMED 45

A. Under the Applicable Standards, Mr. Tamayo-Reyes Is Entitled to an Evidentiary Hearing 45

B. Mr. Tamayo-Reyes Did Not Engage in a Procedural Default 46

C. The Judgment Should Be Affirmed Even if the Court Adopts the Cause and Prejudice Standard 47

CONCLUSION 49

TABLE OF AUTHORITIES

CASES CITED — Page

Barefoot v. Estelle, 463 U.S. 880 (1983) 44
Brewer v. Williams, 430 U.S. 387 (1977) 22
Brown v. Allen, 344 U.S. 443 (1953) ..... *passim*
Buffalo v. Sunn, 854 F.2d 1158 (9th Cir. 1988) 43
Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) 38
Cannon v. University of Chicago, 441 U.S. 677 (1979) 23, 24
Church v. Gladden, 244 Or. 308, 417 P.2d 993 (1966) 46
Coleman v. Thompson, 115 L.Ed.2d 640 (1991) ..30, 32-34, 40, 45
County Court of Ulster County v. Allen, 442 U.S. 140 (1979) 36
Darr v. Burford, 339 U.S. 200 (1950) 35
Davis v. United States, 411 U.S. 233 (1973) 31, 34
Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982) (*en banc*), *cert. denied*, 464 U.S. 9048 (1984) 18
Engle v. Isaac, 456 U.S. 107 (1982) 12, 32
Ex Parte Cuddy, 131 U.S. 280 (1889) 16
Ex Parte Royall, 117 U.S. 241 (1886) 17
Ex Parte Tom Tong, 108 U.S. 556 (1883) 12
Fay v. Noia, 372 U.S. 391 (1963) ..... *passim*
Ford v. Wainwright, 477 U.S. 399 (1986) 44
Francis v. Henderson, 425 U.S. 536 (1976) 31
Frank v. Mangum, 237 U.S. 309 (1915) 16
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 23, 24
Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) 41
Hanna v. Plumer, 380 U.S. 460 (1965) 38
Hawk v. Olson, 326 U.S. 271 (1945) 16
Humphrey v. Cady, 405 U.S. 504 (1972) 18
James v. Kentucky, 466 U.S. 341 (1984) 36
LaVallee v. Delle Rose, 410 U.S. 690 (1973) 22
McCleskey v. Kemp, 481 U.S. 279 (1987) 19, 46
McCleskey v. Zant, 113 L.Ed.2d 517 (1991) 10, 28-30
McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316 (1819) 39

TABLE OF AUTHORITIES—Continued

Page

McNary v. Haitian Refugee Center, Inc., 112 L.Ed.2d 1005 (1991) 23
Midlantic Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986) .. 23
Miles v. Apex Marine Corps, 112 L.Ed.2d 274 (1990) 23
Moore v. Dempsey, 261 U.S. 86 (1923) 16, 35
Murdock v. Memphis, 87 U.S. 590 (1875) 31
Murray v. Carrier, 477 U.S. 478 (1986) 47
Murray v. Giarratano, 492 U.S. 1 (1989) 43
Nix v. Whiteside, 475 U.S. 157 (1986) 18
Picard v. Connor, 404 U.S. 270 (1971) 18, 33
Pusey and Jones v. Hanssen, 261 U.S. 491 (1923) .. 38
Reed v. Ross, 468 U.S. 1 (1984) 12
Riddle v. Dyche, 262 U.S. 333 (1923) 12
Rose v. Lundy, 455 U.S. 509 (1982) 18
Salinger v. Loisel, 265 U.S. 224 (1923) 34, 35
Sanders v. United States, 373 U.S. 1 (1963) 29, 48
Smith v. Digmon, 434 U.S. 332 (1978) 18
Sumner v. Mata, 449 U.S. 539 (1981) 21, 22
Sumner v. Mata, 455 U.S. 591 (1982) 21, 22
Tamayo-Reyes v. Keeney, 926 F.2d 1492 (9th Cir. 1991) ..... *passim*
Townsend v. Sain, 372 U.S. 293 (1963) ..... *passim*
Vasquez v. Hillery, 474 U.S. 254 (1986) 18, 19, 46
Wainwright v. Sykes, 433 U.S. 72 (1977) ..... *passim*
Walker v. Johnston, 312 U.S. 275 (1941) 15
Wilwording v. Swenson, 404 U.S. 249 (1971) 18
Wong Doo v. United States, 265 U.S. 239 (1924) 16, 29
Ylst v. Nunnemaker, 115 L.Ed.2d 706 (1991) 43

STATUTORY AUTHORITIES

11 U.S.C. § 554 23
28 U.S.C. § 1827 ..... 2, 6
28 U.S.C. § 461 (1940 ed.) 13
28 U.S.C. § 2241 ..... 14, 24, 25
28 U.S.C. § 2242 ..... 14, 25
28 U.S.C. § 2243 ..... 13-15, 20
28 U.S.C. § 2244 ..... 14, 26, 29, 30

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 2245	14
28 U.S.C. § 2246	14
28 U.S.C. § 2247	14
28 U.S.C. § 2248	14
28 U.S.C. § 2249	14
28 U.S.C. § 2250	14
28 U.S.C. § 2252	14, 25
28 U.S.C. § 2253	14, 25
28 U.S.C. § 2254	10, 14, 22, 25, 29
28 U.S.C. § 2254(b)	17, 20, 27
28 U.S.C. § 2254(d)	*passim*
Or. Evid. Code 604	48
Or. Rev. Stat. § 40.325	48
Or. Rev. Stat. § 161.205	3
Or. Rev. Stat. § 163.115	2
Or. Rev. Stat. § 163.118	2
Or. Rev. Stat. § 163.125	2
Or. Rev. Stat. § 163.135	2
Or. Rev. Stat. § 163.145	3
Pub. L. No. 94-349, 90 Stat. 822 (1976)	25
Pub. L. No. 94-426, 90 Stat. 1334 (1976)	25
The Judiciary Act of 1789, ch. 20, § 14, 1 U.S. Statutes at Large 81 (1789)	13
Wash. R. App. P. 16.5	43
RULES	
28 U.S.C. foll. § 2254, Rule 4	14
28 U.S.C. foll. § 2254, Rule 5	14
28 U.S.C. foll. § 2254, Rule 6	15
28 U.S.C. foll. § 2254, Rule 7	15
28 U.S.C. foll. § 2254, Rule 8	15
Fed. R. Crim. P. 12	31
OTHER AUTHORITIES	
Act of Sept. 19, 1966, Pub. L. No. 89-590, 80 Stat. 811	24
Administrative Hearing and Court Interpreter Division, *Cal. State Personnel Board Qualifying Examination for Spanish Information and Application Packet*	7

TABLE OF AUTHORITIES—Continued

	Page
Cassell's Spanish Dictionary (1968 ed.)	8
Charles D. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. Rev. 131	13, 21, 42
H.R. Rep. No. 1384, 88th Cong., 2d Sess. (1964)	26, 28
Kathleen Pitchel, *The New Habeas*, 42 Hastings L.J. 939 (1991)	44
Simon and Schuster's, *International Dictionary of Spanish to English and English to Spanish* (1973 ed.)	8
S. Rep. 1502, 89th Cong., 2d Sess. (1966), *reprinted in* U.S.C.C.A.N. 2968	25
S. Rep. 1797, 89th Cong., 2d Sess. (1966), *reprinted in* U.S.C.C.A.N. 3663-4	24
3 William Blackstone, *Commentaries on the Law of England* (1st ed. reprint 1966)	12
2 *Criminal Law* § 14.17 (Oregon CLE 1986)	2, 6
United States Constitution, Article I, § 9, cl. 2	12
University of Arizona Federal Court Interpreter Certification Project, Administrative Office of the United States Courts, *Federal Court Interpreter Certification Examination Manual*	7
Yackle, *Post-Conviction Remedies* 4 (1981)	12, 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1859

J. C. KEENEY, Superintendent,
Oregon State Penitentiary,
Petitioner,

v.

JOSE TAMAYO-REYES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Jose Tamayo-Reyes is a Cuban immigrant with virtually no education. He is unable to read, write or speak English. At the proceeding at which he was found guilty on a plea of *nolo contendere*, Mr. Tamayo-Reyes was represented by an attorney who did not speak Spanish. The person appointed by the court to interpret did not read or write Spanish. J.A. 3. The transcripts reveal that Mr. Tamayo-Reyes did not understand what was happening. In the state post-conviction proceeding, the person who interpreted, Mr. Sanchez, admitted that his method of interpreting was to "just tell him what's happening." J.A. 30. He did not perform simultaneous interpretation.[1]

---

[1] "Simultaneous interpretation means interpreting the proceedings as they occur, at a normal rate, with no pauses to assist the inter-

Sanchez was not an official interpreter, but an attorney who happened to speak Spanish and was called upon "a couple of times . . . [if] they have to have somebody real quickly." J.A. 22. The Spanish words the interpreter used to tell Mr. Tamayo-Reyes what "murder," "manslaughter" and "knowingly" mean were simply incorrect.[2]

The facts of the underlying homicide raise substantial questions about whether a crime occurred and, if so, which degree of the offense.[3] Mr. Tamayo-Reyes and his girl-

---

preter." 2 *Criminal Law* § 14.17 (Oregon CLE 1986). Simultaneous interpreting is generally considered to be the most effective interpreting method utilized in courtroom settings. *See* 28 U.S.C. § 1827(k) (requiring that method to be utilized in federal courts); *see also infra* note 8.

[2] *See infra* pp. (6-8).

[3] The Oregon statutes define several degrees of homicide and the defense of self-defense. Murder is defined in Or. Rev. St. 163.115 as:

> (1) Except as provided in Or. Rev. St. 163.118 and 163.125, criminal homicide constitutes murder:
>
> (a) When it is committed intentionally, except that it is an affirmative defense that, at the time of the homicide, the defendant was under the influence of an extreme emotional disturbance;

Manslaughter in the first degree is defined in Or. Rev. St. 163.118 as:

> (1) Criminal homicide constitutes manslaughter in the first degree when:
>
> (a) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life; or
>
> (b) It is committed intentionally by a defendant under the influence of extreme emotional disturbance as provided in ORS 163.135. The fact that the homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing the homicide which would otherwise be murder to manslaughter in the first degree and need not be proved in any prosecution.

Manslaughter in the second degree is defined in Or. Rev. St. 163.125 as:

friend were drinking in a bar when they got into a fight. His girlfriend pulled out a knife, he pulled out a knife, a man approached carrying a small chair and was stabbed and died.[4]

The no contest plea was entered on a plea petition form used by the Multnomah County court. The form used in this case was, however, in English, not the Spanish version which was also available in that court. J.A. 3. That form had sections written in by hand.[5] Included was one statement raising a potential *mens rea* defense: that Mr. Tamayo-Reyes was "under the influence of alcohol at time of incident." J.A. 12. The request for a factual basis for the plea was completed with the statement: "I request court to consider testimony of witnesses who testified during my bail hearing as factual basis for my plea." J.A. 13. In the state post-conviction hearing, Mr. Tamayo-Reyes testified that he wanted the witnesses to come to court and believed that they were coming. J.A. 40-41.

The record of the change of plea hearing reveals Mr. Tamayo-Reyes' lack of understanding. The trial court

---

> (1) Criminal homicide constitutes manslaughter in the second degree when:
>
> (a) It is committed recklessly; or
>
> (b) A person intentionally causes or aids another person to commit suicide.

Criminally negligent homicide is defined in Or. Rev. St. 163.145 as:

> (1) A person commits the crime of criminally negligent homicide when, with criminal negligence, the person causes the death of anothe person.

Self-defense is provided for in Or. Rev. St. 161.205.

[4] The facts of the incident are taken from the transcript of sentencing in the state court. S.Tr. 1/22/85, pp. 3, 8. They do not appear in the plea transcript or petition.

[5] The trial attorney apparently placed the handwritten words on the form. J.A. 40. The retyped version in the Joint Appendix does not adequately represent the form.

recited Mr. Tamayo-Reyes' trial and constitutional rights in one lengthy paragraph, at the conclusion of which he asked: "Do you understand what I've explained to you?" Mr. Tamayo-Reyes responded "More or less." J.A. 4-5. The following exchange ensued:

> THE COURT: Do you have any questions that you want to ask me?
>
> THE WITNESS: No.
>
> THE COURT: Do you choose to plead no contest and have the conviction go on your record, rather than have a jury trial?
>
> THE INTERPRETER: He doesn't know anything about such things.
>
> THE COURT: Do you choose to have this conviction for manslaughter, rather than have a jury trial?
>
> THE INTERPRETER: He says, "I don't comprehend."

At this point the court repeated the two choices and the attorney asked for a moment during which a conference occurred off the record. When they returned, Mr. Sanchez stated: "He says, 'okay.'" J.A. 6. After some additional inquiry, the court accepted the plea of *nolo contendere*.

Less than one year after he was sentenced, Mr. Tamayo-Reyes filed a petition for post-conviction relief in the state court. The attorney assigned by the state court to represent Mr. Tamayo-Reyes on his petition incompetently litigated the question of the grossly inadequate interpretation during the plea proceeding and Mr. Tamayo-Reyes' lack of understanding of what occurred. The Ninth Circuit highlighted numerous errors on post-conviction counsel's part which rendered the evidentiary procedure utilized insufficient. Both the magistrate and the district court acknowledged Mr. Tamayo-Reyes' characterization of these attempts as being "woefully inadequate." *Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1501 (9th Cir. 1991).

The post-conviction petition alleged, *inter alia*, that Mr. Tamayo-Reyes' plea was not knowing and voluntary. He claimed that because the interpreter used by the court did not translate properly, he did not know that he was agreeing to a finding of guilt of manslaughter, that he was waiving important constitutional and trial rights, and that no trial would take place J.A. 16-17.[6]

The state post-conviction judge was presented with affidavits and a deposition from the interpreter, brief testimony from Mr. Tamayo-Reyes and argument by counsel.

---

[6] The state argues that the Ninth Circuit held that Mr. Tamayo-Reyes abandoned "the last two claims" in his amended petition for post conviction relief. Pet. br. at 5 fn 4. Mr. Tamayo-Reyes does not agree with that statement. The second claim in the amended petition for post-conviction relief alleged that Mr. Tamayo-Reyes received ineffective assistance of counsel simply because he and counsel spoke different languages. That claim has not been pursued. The third claim, however, was compound. In it Mr. Tamayo-Reyes alleged that: a. he was denied effective assistance of counsel because the interpreter did not accurately translate the communications between himself and counsel; b. the improper translation resulted in his failing to understand that the charge was being reduced only because he was pleading guilty; c. further, he did not understand that he was giving up certain constitutional and trial rights. J.A. 16-17. Counsel for Mr. Tamayo-Reyes in the state post-conviction proceeding argued that the conviction should be set aside as a result of the improper translation of manslaughter (J.A. 43, 44) and trial rights (J.A. 46) independent of any claim of ineffective assistance of counsel. The state post-conviction court understood that the claims of improper interpretation and effective representation were distinct and made findings of fact on each. J.A. 51. Judge Trott, writing for the Ninth Circuit, also understood the claims to be distinct. The opinion states: "We treat the *ineffective assistance of counsel* claims as abandoned." *Tamayo-Reyes v. Keeney*, 926 F.2d 1492, 1494 n.2 (9th Cir. 1991) (emphasis added). The court addressed the merits of the sufficiency and effect of the interpretation of the distinction between murder and manslaughter *and* the adequacy of the translation of the plea form and plea proceeding. *Id.* at 1498-1500 and 1495. It is only the articulation of the claim as a Sixth Amendment violation that can be considered abandoned.

No expert was called to inform the court of the meaning of the Spanish words used by the interpreter or to properly translate the critical English words. The attorney did not even bring a Spanish dictionary to the court.

Mr. Tamayo-Reyes' testimony in the state post-conviction trial shows, in the inarticulate language one might expect from a person with little education and sophistication with legal issues, that he did not understand that he participated in a proceeding that resulted in a reduction of his charges from murder to manslaughter and a finding of guilt. He testified that when he made appearances in court, "I didn't understood the interpreter when he was explaining me what was happening." J.A. 39. Mr. Tamayo-Reyes signed the plea petition "because he told me there was going to have a court with all the people." J.A. 40. He wanted the witnesses to come to court "[b]ecause they were saying the truth and how the case happened." J.A. 40. Mr. Tamayo-Reyes only learned that there would be no trial after he was sentenced. J.A. 41.

The deposition of the person used as an interpreter revealed that he is an attorney by training and that he had been used "a couple of times' when somebody was needed "real quickly." J.A. 22. The post-conviction court had the transcript of the plea proceeding in which Mr. Sanchez had testified that he neither read nor wrote Spanish. J.A. 3, 36.[7] Mr. Sanchez admitted that he did not conduct a simultaneous translation, that he would "just tell him what's happening." J.A. 30.[8]

---

[7] In his deposition Mr. Sanchez testified that he does not often read Spanish, does not do so unless he absolutely has to, and that it "has to be very slow." J.A. 28.

[8] The method of interpretation utilized does not comply with either professional norms or standards established by other jurisdictions that have considered the issue. *See, e.g.*, 28 U.S.C. § 1827(k) (1988) ("The interpretation . . . shall be in the simultaneous mode for any party to a judicial proceeding instituted by the United States. . . ."); *Criminal Law*, *supra* note 1 (noting that "simultaneous interpretation" should be utilized in criminal proceedings in Oregon); Administrative Hearing and Court Interpreter Division, *Cal. State Personnel Board Qualifying Examination for Spanish Information and Application Packet* at 1 (1991) ("Administrative Hearing and Court Interpreters provide consecutive and simultaneous interpreting services. . . ."); University of Arizona Federal Court Interpreter Certification Project, Administrative Office of the United States Courts, *Federal Court Interpreter Certification Examination Manual* at 5 (1990) ("A court interpreter must not only possess excellent bilingual skills but also must have the ability to synthesize these linguistic skills and to orchestrate them with superior interpreting techniques in the simultaneous, consecutive, and sight translation modes.").

Post-conviction counsel atempted to have Mr. Sanchez explain to the court how he had translated several of the critical legal concepts for Mr. Tamayo-Reyes. While the effort was woefully inadequate, the few questions that were asked and answered reveal that Mr. Tamayo-Reyes was not properly informed. Mr. Sanchez stated, in English, that he translated "murder" as "that he had killed somebody without the right to do so." J.A. 26. The Spanish words which he used are spelled out in the record as "matador quested mato persona permysso dercheo paramat." J.A. 26-27. These letters, if they even form words, are gibberish. J.A. 62. Regarding his interpretation of the term "manslaughter," Mr. Sanchez testified in English that he said "that it was less than murder." J.A. 27. This does not convey the legal difference among the degrees of homicide.[9]

In all other instances, Mr. Sanchez's interpreting effort was not even substantially correct. Mr. Sanchez translated "knowing or knowingly" as "el savia lo que estava esando." J.A. 27. While these words were spelled into the record in Spanish, they were not translated into English so that the post-conviction court could attempt to as-

---

[9] The spanish words used by the interpreter were "era menos." J.A. 27.

sess the adequacy of the interpreting provided Mr. Tamayo-Reyes.[10]

Finally, when asked how he interpreted the terms "indifferent" or "indifference," critical portions of the mental state element of manslaughter in the first degree, Mr. Sanchez could not answer. J.A. 27. Given the previous inaccuracies in interpretation, one can only imagine what Mr. Sanchez actually told Mr. Tamayo-Reyes with respect to such terms. No other evidence was offered.

In arguing the case for Mr. Tamayo-Reyes, post-conviction counsel attempted to evaluate the translation based on his own knowledge of Spanish. His efforts were, however, cut off, and he only commented on the Spanish words which were actually translated into English by Mr. Sanchez. J.A. 43-44. The state post-conviction court apparently relied on Mr. Sanchez's assertion that he had correctly interpreted for Mr. Tamayo-Reyes and denied relief.

After Mr. Tamayo-Reyes had exhausted his state remedies, he filed a petition for a writ of habeas corpus in

---

[10] In fact, the phrase could not have been translated into English at all. The words "estava" and "esando" do not appear in a Spanish dictionary. The word "savia" does exist and it translates into English as "sap of a plant," "energy," or "vitality." The professional interpreter hired by Mr. Tamayo-Reyes in the Federal Court offered a translation which was based on the assumption that "permysso" was intended to be "Permiso" and that "dercheo" was intended to be "derecho." J.A. 62. Even with those assumptions, the translations did not make sense. Reference to a Spanish/English dictionary reveals that the majority of the words spelled out do not exist. *See generally, Cassell's Spanish Dictionary* (1968 ed.). In its present form, it is not possible to translate that phrase into English. Even making the various assumptions above does not render the sentence at all comprehensible. Assuming Mr. Sanchez was attempting to say something to the effect of "he knew what he was doing," the proper Spanish translation by reference to a standard Spanish/English dictionary would have been "él sabía lo que estaba haciendo."

Spanish/English dictionaries utilized were *Cassell's Spanish Dictionary* (1968 ed.) and Simon and Schuster's *International Dictionary of Spanish to English and English to Spanish* (1973 ed.).

federal court. The federal court was provided with transcripts of the relevant state proceedings and the state moved for summary judgment. Mr. Tamayo-Reyes opposed that motion and requested an evidentiary hearing, arguing that the state proceeding was not full and fair, and that the material facts were not adequately developed in the state court. He also argued that the presumption of correctness in 28 U.S.C. § 2254(d) should not apply. In support of his request, Mr. Tamayo-Reyes submitted an affidavit from a professional Spanish language interpreter. As discussed above, her affidavit revealed some of the gross inadequacies in the interpretation in the state court. The District Court denied Mr. Tamayo-Reyes' request for an evidentiary hearing and granted the state's motion for summary judgment. The Ninth Circuit reversed and this proceeding ensued.

SUMMARY OF ARGUMENT

Habeas corpus serves a function outside the trial-appellate continuum. These collateral proceedings are not appeals requiring decision on an existing record. Rather, habeas corpus calls for the judiciary to exercise its sound discretion to consider all facts which have a rational bearing on the issues presented. While infrequently used, the availability of fact development proceedings is an integral part of habeas corpus. Application of a rule which would further limit such hearings is antithetical to the purposes and history of the writ.

The state posits the question before this Court as which of two tests to apply. Their position assumes that what occurred in this case can be considered a procedural default. Proper resolution of the issues presented requires a broader analysis and understanding of the nature of habeas corpus.

Congress and the courts have provided significant protection to state interests in the fact development process. These protections are found in three distinct doctrines:

exhaustion of state remedies, the requirements set forth in *Townsend v. Sain*, 372 U.S. 293 (1963) and the presumption of correctness contained in 28 U.S.C. § 2254(d).

The judiciary is not empowered to superimpose a cause and prejudice standard because Congress has acted in this area on several occasions subsequent to the decision in *Townsend*. The rules of statutory construction require the Court to assume that Congress was aware of and incorporated the standard set out in that case when it amended 28 U.S.C. § 2254 in 1966 and adopted the Rules Governing § 2254 cases in the United States District Courts in 1976. The state's reliance on *McCleskey v. Zant*, 113 L.Ed.2d 517 (1991), is misplaced.

The policies underlying the "cause and prejudice" standard are inapplicable to the question of the scope of evidentiary hearings in federal habeas corpus actions. That test was devised to determine when a state prisoner would be precluded from pursuing claims in federal court after violating a state's procedural rules, not the adequacy of a factual record. The issues presented in this case do not involve the failure to observe state procedural rules. The question framed by petitioner misstates the issues actually present in this case.

The weight of the federal and state interests at stake in this case militate against application of the cause and prejudice standard. Once the federal courthouse door has opened and the legality of a prisoner's detention is under consideration, the interests of the federal courts and the integrity of their processes should be accorded greater weight than the interests of the state.

The rule proposed by the state would preclude hearings in most habeas corpus cases. Any fact worth adducing in a federal hearing is "material." If it has been presented in the state proceedings, no federal hearing is necessary. If it has not, the state would require a showing of cause before it can be presented. While the cause standard is

generally difficult to meet, in many post-conviction cases it may be virtually impossible.

The cause and prejudice standard is not needed in this area because very few hearings are held in federal habeas corpus actions. Those hearings which are held are important. No need exists for a rule further limiting federal habeas corpus hearings.

Mr. Tamayo-Reyes fairly presented his claims to the state court. He satisfied the requirements of exhaustion, *Townsend*, and 28 U.S.C. § 2254(d). An evidentiary hearing is necessary to consider the issues of fundamental fairness at stake in this case.

ARGUMENT

I. FACT DEVELOPMENT PROCEEDINGS ARE AN INTEGRAL PART OF THE HABEAS CORPUS PROCESS.

Introduction

Mr. Tamayo-Reyes is asking the federal courts for access to basic courtroom procedures. He is not urging the federal court to intervene in or circumvent ongoing state proceedings or forgive violations of state rules. He is asking the federal court to do something which it has the power to do in all cases—take evidence—and which this Court has said is *mandatory* in some circumstances and discretionary in all others. *Townsend* at 312.

A. Background.

The powers and obligations of the federal courts in considering habeas corpus petitions are broad, extending to all procedural devices necessary to ensure fair consideration of the issues presented. The federal courts may, in their discretion, limit their inquiry to review of state court records if that will suffice. If not, there can be no question but that they are obligated to look beyond those records.

Habeas corpus is a vehicle to challenge the legality of a prisoner's confinement which exists outside the trial-appellate continuum of a criminal case. It is a separate civil action. *Riddle v. Dyche*, 262 U.S. 333, 335-36 (1923).

> The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings. . . .

Ex Parte Tom Tong, 108 U.S. 556, 559 (1883).[11]

B. The Statutory Scheme Supports an Evidentiary Hearing in this Case.

Congress has made the availability of fact development central to the function of the writ. The need for federal

[11] The writ of habeas corpus holds an honored position in our jurisprudence. *Engle v. Isaac*, 456 U.S. 107 (1982). It stands as a "bulwark against convictions that violate fundamental fairness." *Id.* 126. The great writ comes to us from antiquity, its roots tracing back at least to Magna Carta. Yackle, *Post-Conviction Remedies* 4 (1981). The writ of habeas corpus was imported to the colonies from England and given prominence in Article I, § 9, cl. 2 of the Federal Constitution and subsequently the constitution of every state. *Id.* at 13.

Habeas corpus has been called "the most celebrated writ in English law." 3 William Blackstone, *Commentaries on the Law of England*, ch. 8 at 129 (1st ed. reprint 1966). The writ is not simply a legal tool to challenge confinement. Its "history is inextricably intertwined with the growth of the fundamental rights of personal liberty." *Fay v. Noia*, 372 U.S. 391, 401 (1963). As noted in *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972):

> There can be no doubt that in enacting § 2254, Congress sought to "interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action."

hearings was recognized in the Judiciary Act of 1789. Ch. 20, § 14, 1 Stat. 81 (1789). Section 14 of the Act of 1789 provides in pertinent part:

> Sec. 14. That all the . . . courts of the United States, shall have power to issue writs of . . . *habeas corpus*. . . . And that either of the justices of the supreme court, as well as judges of the district courts, shall have the power to grant writs of *habeas corpus for the purpose of an inquiry* into the cause of the commitment.—Provided, That writs of habeas corpus shall in no case extend to prisoners in goal, unless they are in custody, under colour of the authority of the United States, or are committed for trial before the some court of the same, or are necessary to be brought to court to testify. (emphasis added).

The Habeas Corpus Act of 1867 specifically provided for evidentiary hearings. 14 Stat. 385 (1867). After a determination was made that a habeas corpus petition had merit, the presiding judge was to issue the writ and require the petitioner's custodian to bring the petitioner before the court and "certify the true cause of [petitioner's] detention." 14 Stat. 386. At that time, the petitioner in open court could deny the allegations in the custodian's return. *Id.*; *see also* Charles D. Weisselberg, *Evidentiary hearings in Federal Habeas Corpus Cases*, 1990 B.Y U. L.Rev. 131, 139 n.38.

The habeas corpus provisions of the federal code were revised to RS 761 (1873) and later recodified at 28 U.S.C. § 461 (1940 ed.). The Judicial Code and Judiciary Act of 1948, 62 Stat. 869 (1948), recodified and reworded § 461 into 28 U.S.C. § 2243. That section provided that "the Court shall hear and determine the facts and dispose of the matter as law and justice require." That section has not been subsequently amended.

The legislative scheme as it exists today is highly focussed on fact-finding processes in federal court. 28

U.S.C. §§ 2241-42 set out the power to grant the writ and the nature of the application. Section 2243 establishes a show cause procedure. That section of the statute allows both the applicant and respondent to controvert facts. The statute then directs the court to "summarily hear and determine the facts. . . ." Section 2244 defines the finality of prior determinations on issues raised in a prior habeas petition. It assumes, however, that evidentiary hearings will be held: "(b) . . . [A]fter an evidentiary hearing on the merits of a material factual issue. . . ." Section 2245 addresses the evidentiary question of admissibility "on the hearing of an application for a writ" of a certificate of the judge who presided over the trial. Section 2246 provides that "evidence may be taken orally or . . . by deposition, or by affidavits." Section 2247 provides for the admissibility of certain documentary evidence. Section 2248 establishes a rule of "conclusiveness" of the allegations in a return which are not traversed "except to the extent that the judge finds from the evidence that they are not true." Sections 2249 and 2250 provide for presentation of documents and money for an indigent prisoner to obtain various documents. Sections 2252 and 2253 address issues of notice and appeal. Section 2254(d) assumes that evidentiary hearings will be held in habeas actions and establishes detailed evidentiary rules for those hearings.

The Rules Governing Section 2254 Cases in the United States District Courts, adopted by this Court and approved by Congress, further evidence Congress' intention regarding evidentiary hearings in the habeas corpus process. The Rules provide for different levels of consideration depending on the issues and facts alleged. The procedures allow for preliminary review and summary disposition of a petition if it plainly appears to lack merit. *See* 28 U.S.C. foll. § 2254, Rule 4. If such summary dismissal is not appropriate, the state may be required to answer. Rule 5. If the initial pleadings suggest that

evidentiary disputes exist, "the processes of discovery available under the Federal Rules of Civil Procedure" may be employed. Rule 6. If the district court needs additional facts, they may be presented in the form of documents and affidavits. Rule 7.[12] If expansion of the record is an insufficient vehicle for resolving disputed facts, a hearing with live witnesses shall be held in the discretion of the court. Rule 8.

C. The Caselaw Supports the Decision of the Ninth Circuit in Requiring an Evidentiary Hearing in this Case.

The decisions of the Court for more than 100 years reflect the integral role of federal fact-finding processes in resolution of habeas corpus petitions. They further reveal the Court's understanding that Congress' intent in the various Habeas Corpus Acts has been unwavering. As stated in *Brown v. Allen*, 344 U.S. 443, 462-464 (1953):

> A federal judge on a habeas corpus application is required to "summarily hear and determine the facts, and dispose of the matter as law and justice require," 28 U.S.C. § 2243. This has long been the law.
>
> . . .
>
> However, a trial may be had in the discretion of the federal court or judge hearing the new application.

The *Brown* Court's comment "[t]his has long been the law," 344 U.S. at 462, referred back at least to 1867. As noted in *Walker v. Johnston*, 312 U.S. 275 (1941):

> The Court or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments . . . 'in other circuits, if an issue of facts is presented, the practice appears to have been to issue the writ, have the petition produced, and hold a hearing at which evidence is re-

[12] The state's argument would, if accepted, equally limit the use of Rule 7 expansion of the record.

> ceived. This is, we think, the only admissible procedure [under] the Habeas Corpus Act of 1867.

Id. at 285.

Twenty years earlier in *Moore v. Dempsey*, 261 U.S. 86, 92 (1923), the Court described the process as follows:

> We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a judge of the United States to escape the duty of examining the facts for himself, when, if true, as alleged, they make the trial absolutely void. . . . We will not say that they cannot be met, but it appears to us unavoidable that the district judge should find whether the facts alleged are true, and whether they can be explained so far as to leave the state proceedings undisturbed.

See Ex Parte Cuddy, 131 U.S. 280, 286 (1889) ("We do not mean to say that this presumption may not be overcome by evidence. . . . [I]f the appellant had alleged such facts . . . he would have been entitled to the writ, and, upon proving such facts, to have been discharged."); *Frank v. Mangum*, 237 U.S. 309, 331-332 (1915) ("a prisoner . . . may have a judicial inquiry into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction . . . to inquire into jurisdictional facts, whether they appear on the record or not"); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924) ("The petitioner had full opportunity to offer proof of it at the hearing on the first petition. . . ."); *Hawk v. Olson*, 326 U.S. 271, 274-275 (1945) ("Since *Frank v. Mangum*, this Court has recognized that habeas corpus . . . is a proper procedure . . . even though the events . . . did not appear upon the face of the record. . . . The legislation enlarged for the federal courts the 'bare legal review of the authority under which a petitioner was held. . . .'"); *Townsend v. Sain*, at 311 ("the whole history of the writ—its unique development

—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of the courts of appeallate review").

D. Conclusion.

The approach to habeas corpus advanced by the state is antithetical to the nature and purposes of the writ. The state seeks to redefine the writ as something more closely related to an appellate process than its function and history allow. The state simply ignores the repeated enactments by Congress and statements by this Court about the critical role which fact-finding procedures play in habeas corpus cases.

The state's efforts to redefine the writ are grounded in references to the importance of finality, federalism and comity. The effect of the state's position is to skew state/federal relations in a manner that demeans the powers of the federal courts.

II. CONGRESS AND THE COURTS HAVE CAREFULLY PROTECTED STATE INTERESTS IN THE FACT DEVELOPMENT PROCESS.

State interests in the fact development process in federal habeas corpus are protected by three distinct but related doctrines. These are the requirement of exhaustion of state remedies, the standard set out in *Townsend*, and the presumption of correctness.

A. The Exhaustion Doctrine.

The exhaustion doctrine is presently codified in 28 U.S.C. § 2254(b), which provides in part:

> An application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . .

At least since 1886 and the decision in *Ex Parte Royall*, 117 U.S. 241 (1886), the Court has employed the ex-

haustion doctrine to protect the states' federalism interests in determining whether a petitioner should be permitted to proceed in federal court on a habeas corpus petition.

The federal courts and Congress have concluded that proper respect for the states' role in our federal system requires that the federal courts allow the states the first opportunity to correct constitutional violations. *See Picard v. Connor*, 404 U.S. 270, 275 (1971).

The exhaustion requirement is only met when the federal claims are "fairly presented" in the state forum. *Picard*, *supra*. The Court has most often defined "fairly presented" by explaining what is not permissible. A claim has been fairly presented in state court when additional facts are adduced in a habeas hearing unless the new evidence "fundamentally alters the legal claim." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). The Court noted in *Picard* that variations in legal theory or "factual allegations" do not render a claim unexhausted as long as the essence of the claim was presented. *Picard*, 404 U.S. at 277.

Reformulation of claims is permissible unless the claims are "clearly distinct" from the claims presented in state court. Then, the exhaustion requirement has not been met. *See Humphrey v. Cady*, 405 U.S. 504, 517 n.18 (1972). An entire body of law has been developed regarding the exhaustion doctrine to meet the respective state and federal interests. *See, e.g., Rose v. Lundy*, 455 U.S. 509 (1982) (mixed petitions must be dismissed); *Wilwording v. Swenson*, 404 U.S. 249 (1971) (repetitive state proceedings need not be pursued); *Smith v. Digmon*, 434 U.S. 332 (1978) (exhaustion satisfied even if state does not rule on properly presented claim); *Nix v. Whiteside*, 475 U.S. 157 n.3 (1986) (claim reformulated but further proceedings would be futile); *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (*en banc*), *cert. denied*, 464 U.S. 9048 (1984).

Vasquez v. Hillery, *supra*, and *McCleskey v. Kemp*, 481 U.S. 279 (1987), illustrate the proper balance of federal/state interests. Vasquez had a hearing in the state court at which evidence on his discrimination claim was adduced. In federal court he introduced further evidence regarding discrimination in the grand jury process. He also offered expert testimony in the form of a computer analysis of the probability that chance would have accounted for the exclusion of blacks from the grand jury. 474 U.S. at 258-259. The claim was not reformulated or "fundamentally altered." The Court stated:

> Form would indeed triumph over substance were we to allow the question of exhaustion to turn on whether a federal judge has relied on educated conjecture or has sought out a more sophisticated interpretive aid to accomplish the same objective.

474 U.S. at 260. The Court approved the holding of the hearing. *Id.*

In the Georgia courts McCleskey had submitted an affidavit of one William J. Bowers, a sociologist and author of a study of the administration of the death penalty in Georgia.[13] In the district court McCleskey proffered a sophisticated statistical study by Professors Baldus, Pulanski and Woodworth. The new and comprehensive evidence was accepted and considered by the federal courts. The decision of this Court does not contain any discussion about the propriety of review or suggestion that the evidence could not be considered because he had defaulted on the claim or failed to exhaust his state remedies.

The protections afforded state interests by the exhaustion doctrine as exemplified in *Vasquez* and *McCleskey v. Kemp* are strong. A petitioner may only get into the

[13] The facts about the state proceeding are found in the Order of the Superior Court of Butts County on case number 4909, dated April 8, 1981.

federal court if he has fairly presented his claims. If not, the federal courts are to summarily dismiss the petition under 28 U.S.C. §§ 2243 and 2254(b) for failure to exhaust.

B. The *Townsend* Holding.

Once the door to the courthouse is open, *Townsend* provides the second line of deference to state interests. Evidentiary hearings need not be held if "the state court trier of fact has after a full hearing reliably found the relevant facts." 372 U.S. at 312-313. A hearing is mandatory only if any one of six circumstances exist:

> 1) the merits of the factual dispute were not resolved in the state hearing; 2) the state factual determination is not fairly supported by the record as a whole; 3) the fact-finding procedure employed the state court was not adequate to afford a full and fair hearing; 4) there is a substantial allegation of newly discovered evidence; 5) the material facts were not adequately developed at the state court hearing; or 6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313. In other circumstances, the federal courts retain the discretion to order an evidentiary hearing. *Id.* at 318.

The *Townsend* Court recognized that adducing additional facts in federal court under the fifth category should not be permitted lightly. As a result, the Court held that a petitioner could only do so if he had not deliberately bypassed the state proceedings.

The discussion in *Townsend* about deliberate bypass suggests that the Court was importing a concept of responsibility into the definition of "adequate" in the fifth circumstance described in that opinion. That concept directs the Court to ask why facts were not adequately developed. *Townsend* provided the framework for answering that question with the deliberate bypass test which ensures that the federal courts will not unduly interfere in state proceedings.

C. § 2254(d)—The Presumption of Correctness.

Once a federal habeas corpus petitioner convinces the federal court that he has given the state a fair opportunity to rule on his claims, has not deliberately bypassed the state, and has commenced the federal hearing, he must still operate under the evidentiary presumption of correctness erected in 28 U.S.C. § 2254(d). That section provides that in a federal habeas hearing "a determination after a hearing on the merits of a factual issue" by a state court "shall be presumed to be correct" unless one of eight factors is present. If the presumption of correctness is applicable, the habeas petitioner in an evidentiary hearing bears the burden of establishing "by convincing evidence that the factual determination . . . was erroneous."

Section 2254(d) was specifically intended by Congress to address the federalism, comity, and finality concerns of the states. The Court has understood § 2254(d) to be a successful codification of the applicable federalism concepts. *See Sumner v. Mata*, I, 449 U.S. 539 (1981) and *Sumner v. Mata*, II, 455 U.S. 591 (1982).

Section 2254(d) is a distinct rule which governs the standard of proof in a federal habeas hearing. *See* Weisselberg, *supra* at 154-55. The rule requires the federal courts, even when a petitioner has shown proper respect for state proceedings, to presume that factual findings made in the state courts are correct. The rule does not preclude evidentiary hearings or limit their scope.

Since 1966 this Court has consistently followed § 2254(d), going so far as to insist that lower courts cite the particular subsection of that provision which applies when they proceed to rely on fact findings other

than those made by the state courts. In *Sumner v. Mata*, I, the Court stated:

> When it enacted the 1966 amendment to 28 U.S.C. § 2254, [28 U.S.C. § 2254] Congress specified that in the absence of the . . . factors [enumerated in subsections (d)(1)-(8)] the burden shall rest on the habeas petitioner . . . to establish 'by convincing evidence that the factual determination of the state court was erroneous . . . [W]e now hold that a habeas corpus court should include in its opinion granting the writ the reasoning which lead it to conclude that any of the seven [eight] factors was present . . . .

449 U.S. at 551-52. *Accord Sumner v. Mata*, II 455 U.S. 591, 593 (1982).

The language in § 2254(d)(3) is identical to the language in the fifth subsection of *Townsend*, 372 U.S. at 313. Congress recognized that it is appropriate to dispense with the presumption of correctness when "the material facts were not adequately developed at the state court hearing." 28 U.S.C. § 2254(d)(3). As a result, the state's argument would logically apply the cause and prejudice standard to both the question of when an evidentiary hearing is to be held and the question of when the presumption of correctness can be overcome.[14]

D. Conclusion.

The state ignores the strong protection to state interests provided in the habeas corpus law. They ignore the existing rules which limit when fact development may take place in habeas corpus proceedings.

---

[14] The court has, at times, called § 2254(d) a codification of *Townsend*. *See, Brewer v. Williams*, 430 U.S. 387, 395 (1977). At other times, the distinction in function has been noted. *See LaVallee v. Delle Rose*, 410 U.S. 690, 694 (1973) (Marshall, J. dissenting).

III. CONGRESS HAS ADOPTED THE STANDARD SET OUT IN *TOWNSEND*.

Introduction

Townsend was decided in 1963. On two occasions since then Congress has acted in the area of habeas corpus hearings. The rules of statutory construction compel the conclusion that Congress has ratified the *Townsend* standard. The state's argument that Congress has not adopted the *Townsend* standard is deficient in several respects. First, they ignore the settled rules of statutory construction. Second, they ignore the scope of the changes made by the 89th Congress. Third, they ignore Congress' actions in 1976. Fourth, they push recent caselaw too far.

A. Congress Is Presumed to Know the Law.

The Court has repeatedly held in a variety of contexts that Congress is presumed to know the law, be aware of existing decisions, and accept judicial interpretations unless it specifically states to the contrary. *See, e.g., Miles v. Apex Marine Corps*, 112 L.Ed.2d 274, 290-291 (1990); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *McNary v. Haitian Refugee Center, Inc.*, 112 L.Ed.2d 1005, 1020 (1991).

Midlantic Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986), arose in a context which has particular relevance to the issue in this case. The question before the Court, whether § 554(a) of the Bankruptcy Code, 11 U.S.C. § 554(a), authorized a trustee to abandon property in certain situations, required analysis of the relationship between statutes and caselaw. The Court stated:

> The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.

474 U.S. at 501. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988).

B. The Relationship Between *Townsend* and 28 U.S.C. 2241-54.

The *Townsend* standard was enunciated in 1963. In 1966 Congress acted in a related area of habeas corpus law when it enacted 28 U.S.C. § 2254(d). While its purpose was to promote the interests of the states in finality,[15] the analysis cannot stop there, but must continue to an examination of the full course Congress pursued. Congress did not overrule *Townsend*. Nor did it seek to limit the circumstances in which a habeas petitioner should be granted a hearing. Instead, Congress legislated a presumption of correctness to be applied *in* evidentiary hearings.

Not only does Congress' action presume that hearings will take place, it adapted the standard set out in *Townsend* to the question of how the hearings should proceed. The language in § 2254(d)(3) is *identical* to that in subsection (5) in *Townsend*. The presumption that Congress knows the law is empirically supported here by use of the identical language. This case is stronger than *Cannon, supra*. The state's effort to jettison the deliberate bypass standard cannot be squared with Congress' passage of § 2254(d). *See Goodyear Atomic Corp. v. Miller, supra*.

The 1966 amendments to the habeas corpus act were not limited to § 2254(d). Congress also amended § 2241 to provide jurisdiction over habeas proceedings to district courts both in the district in which a petitioner is held and the district in which the conviction occurred.[16] The Senate report which accompanied the legislation underscores Congress' understanding of the importance of hearings in habeas cases and the impact of this Court's then, recent decisions:

> As a result of recent Supreme Court decisions . . . the scope of inquiry in hearings has been greatly expanded. Questions of fact now reviewable may require the testimony of witnesses and the introduction of other evidence.

S. Rep. 1502, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2968, 2969. In amending § 2241 Congress not only expressed its awareness of the recent developments in the caselaw, but acted to *accommodate* them through a jurisdictional amendment to bring more efficiency to the hearing process. The action provides clear proof of Congress' adoption of the hearings standards.[17]

Action on the 1977 amendments to the Rules Governing § 2254 Proceedings in the United States District Courts provides further support for the argument that Congress has approved *Townsend*. Those amendments detailed the hearings process and described several different fact finding procedures. The Advisory Committee notes to Rules 7 and 8 are replete with references to the necessity for hearings and passages from *Townsend*. The Rules were approved by Congress. Pub. L. No. 94-349, 90 Stat. 822 (1976); Pub. L. No. 94-426, 90 Stat. 1334 (1976).

The principles of statutory construction require that the Court presume that our legislators are aware of the relevant law. Imposition of the cause and prejudice standard to limit federal hearings is contrary to Congress' intent and action.

---

[15] See S. Rep. No. 1797, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 3663, 3663-4.

[16] Act of Sept. 19, 1966, Pub. L. No. 89-590, 80 Stat. 811.

[17] The Court was faced with a similar question of statutory interpretation in *Brown v. Allen*, 344 U.S. 443 (1953). The question there was whether the 1948 amendments to 28 U.S.C. § 2241-54 had eliminated the right of a state prisoner to apply for federal habeas corpus relief. In rejecting that position, the Court looked to the entire statutory scheme:

> The suggested elimination of district and circuit courts does not square with the other statutory habeas corpus provisions. *See* 28 U.S.C. §§ 2241, 2242, 2251, 2252, 2253, 3d paragraph. We are unwilling to conclude without a definite Congressional direction that so radical a change was intended.

344 U.S. at 450.

1. *The state's reliance on H.R. Rep. No. 1384, 88th Cong., 2d Sess. (1964), is misplaced.*

The state argues that the legislative history as set out in H.R. Rep. No. 1384 shows Congress' antipathy to habeas corpus hearings. We respectfully submit that petitioner is incorrect.

The state calls the bill passed in 1966 "substantially similar" to that proposed in 1964. Pet. br. at 19, fn. 11. One significant difference exists. Section 2254(e) as proposed in 1964 contained seven exceptions to the presumption of correctness. Omitted was the "catch-all" eighth subsection in the 1966 law which permits the federal courts to review the entire record and conclude that factual determinations are not fairly supported. H.R. Rep. No. 1384 at 2-3. Between 1964 and 1966, therefore, Congress *expanded* the number of situations in which the presumption of correctness would not apply.

In 1964 Congress considered the amendments to § 2244 which were adopted in slightly different form two years later. Congress did not then, nor in 1966, consider a section on "finality of determination" which would have given preclusive effect to prior legal or factual determinations of state courts as it did for prior determinations by federal judges. Instead, Congress adopted the evidentiary rule found in § 2254(d).

H.R. Rep. No. 1384 also contains an extensive discussion of efforts made in Congress to severely restrict habeas corpus. Review of that discussion reveals that proposals quite similar to that sought here by the state were introduced in Congress and rejected.

A 1954 proposal would have permitted the federal courts to "entertain" habeas petitions only if the issue had not previously been raised and determined, there was no fair and adequate opportunity to do so *and* no remedies were available in the state court. H.R. Rep. No. 1384 at 16. A similar bill was introduced and died in the 86th Congress. *Id.* at 17. In the 86th Congress an effort was made, at the behest of various state attorneys general, to amend § 2254(b) to permit discharge of state prisoners only by a three-judge federal court. *Id.* at 21. This proposal was based on the belief that permitting one federal judge to release a state prisoner denigrated the state proceedings. *Id.* at 22. This too was defeated.

In discussing why the restrictive bills were not reintroduced in 1964, Congress' true understanding of the importance of habeas corpus hearings was revealed:

> We come now to the second proposed amendment. If the bill is reintroduced, we feel reasonably certain an amendment with respect to the effect to be given to State court factual determinations, where the same factual issue arises in a proceeding instituted in a federal court by an application for a writ of habeas corpus by a state court prisoner, will be offered by the State organizations referred to above.
>
> . . .
>
> Of course, an amendment such as was proposed to our committee by the representatives of such State organizations . . . would be wholly incompatible with the duty of Federal courts to determine federal constitutional questions. However, your Committee is of the opinion that a provision in the proposed statute dealing with the questions of presumption and burden of proof would be both practical and desirable.

Id. at 23.[18] This Court should not judicially legislate what Congress has repeatedly refused to enact.

---

[18] The discussion which followed in the report referred to a number of cases which included passages about the importance of habeas corpus and federal hearings. *Id.* at 24-25. The state's reference to several passages from *Brown v. Allen* does not convey the tenor of the committee's report. The first quote from *Brown* which appears at page 19 of the state's brief is incomplete. The committee report continued:

> In other circumstances the state adjudication carries the weight that federal practice gives to the conclusion of a court of last

The conclusion of the report is not what the state argues (Pet. br. at 19), but rather, a discussion of the evidentiary rule which eventually was enacted in 28 U.S.C. § 2254(d). This conclusion reveals that the committee clearly understood that it was not in any manner limiting the right to habeas hearings. The sole issue with which the committee dealt was the evidentiary question of "the weight to be given" state court factual determinations. It was "obvious" to the committee that no presumption of correctness should apply in the seven areas included in the proposed bill, including the situation in which material facts were not adequately developed in the state hearing. H.R. Rep. No. 1384 at 25.

2. *The state's reliance on the legislative history discussion in McCleskey v. Zant is misplaced.*

The state argues that adoption of the cause and prejudice standard in the abuse of the writ area last term in *McCleskey v. Zant*, 113 L.Ed.2d 517 (1991), supports adoption of that standard here. We respectfully submit to the contrary that the Court's reasoning in *McCleskey v. Zant* provides further support for Mr. Tamayo-Reyes' analysis.

The decision was based on the similarity in the concerns addressed by the procedural default doctrine and those addressed in the rules barring successive habeas petitions.

> This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas.

113 L.Ed.2d at 542. No parallel to procedural default exists here.

Critical to the analysis in this case is the conclusion of the Court in *McCleskey v. Zant*, that application of the

---

resort of another jurisdiction on federal constitutional issues. It is not *res judicata*.

H.R. Rep. No. 1384 at 25.

cause and prejudice standard did not mark a significant break from prior law. Rather, the Court concluded that the cause and prejudice standard was "consistent" with decisions which predated *Fay v. Noia*, 372 U.S. 391 (1963) and the 1948 Amendments to 28 U.S.C. § 2244. *Id.* at 545. In contrast, as the state recognizes throughout its brief, application of the cause and prejudice standard in this case would require the Court to repudiate the long standing law regarding the right to a hearing.

McCleskey v. Zant is inapplicable for yet another reason. The Court has taken the lead on the successive petition/abuse of the writ aspect of habeas corpus procedure. As noted in *McCleskey v. Zant*, Congress first addressed the issue of repetitive habeas corpus petitions in 1948. 113 L.Ed.2d at 537. Congress' action followed a long series of decisions by this Court which had first established the doctrine. In contrast, Congress has taken the lead role in defining when hearings should be held in habeas corpus actions.

When Congress addressed the question of successive petitions and abuse of the writ in 1948, it did not intend to disrupt the judicial evolution of habeas principles. *Id.* 113 L.Ed.2d at 538. *See* Revisor's Note to 28 U.S.C. § 2254 (1948). Indeed, long before *McCleskey v. Zant*, in *Sanders v. United States*, 373 U.S. 1 (1963), the Court noted that Congress' silence on the standard for abuse of the writ was "not intended to foreclose judicial application of the abuse of writ principle as developed in *Wong Doo* and *Price*." *Id.* at 12. The 1966 Amendment to § 2244 similarly "was not intend[ed] . . . to foreclose application of the court announced principles defining and limiting the district court's discretion to entertain abusive petitions." *McCleskey v. Zant*, 113 L.Ed.2d at 540.

The Court's conclusions in *McCleskey v. Zant* regarding the relationship between the Congressional and judicial roles in the area of abuse of the writ were central to that decision. The relationship between the Court and Con-

gress regarding evidentiary hearings is different. Here Congress has taken the leading and preemptive role. *McCleskey v. Zant*'s conclusion, that § 2244(b) did not incorporate a standard which precluded adoption by the Court of the cause and prejudice standard, is inapplicable to the issue before the Court.

IV. THE CAUSE AND PREJUDICE TEST IS INAPPLICABLE TO THE QUESTION OF WHEN AN EVIDENTIARY HEARING SHOULD BE HELD.

The cause and prejudice test was articulated to address concerns regarding state procedural rules which are not present in this case. Application of that test in this situation would be unworkable and would not lead to a uniform rule applicable nationwide. Balancing the federal and state interests in this area weighs against the use of the cause and prejudice standard.

A. The Cause and Prejudice Test is Only Applicable When an Adequate and Independent Ground Exists to Deny Federal Review.

1. *The foundation of the test.*

Cause and prejudice was first fully articulated by the Court in *Wainwright v. Sykes*, 433 U.S. 72 (1977), as the test to determine whether a habeas corpus petitioner's failure to comply with a state's procedural rules should bar federal review. In *Sykes* the Court confronted an aspect of habeas corpus procedure on which Congress had never, and has not, spoken.[19]

The rule had its genesis in the principle of federalism that independent state substantive grounds insulate a state decision from review by a federal court. *See Coleman v. Thompson*, 115 L.Ed.2d 640, 655 (1991); *Murdock v. Memphis*, 87 U.S. 590 (1875); Yackle, *supra* at 305, 331, 336. That doctrine was first applied to an independent procedural ground in *Davis v. United States*, 411 U.S. 233 (1973). There the petitioner had failed to comply with the requirements of Fed. R. Crim. P. 12 (b)(2) which specifically provides that certain defenses "may be raised only on motion before trial . . . and that failure to do so constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." The Court concluded that a petitioner must show not only "cause" for the default, but also "actual prejudice" resulting therefrom. 411 U.S. at 245.

Three years later, in *Francis v. Henderson*, 425 U.S. 536 (1976), the holding in *Davis* was applied to a state habeas corpus petitioner who challenged the composition of his grand jury after failing to make a timely challenge in state court. The decision in *Francis* did not make it clear whether the court was repudiating *Fay*, *supra*, or merely distinguishing it.

The following term, in *Wainwright v. Sykes*, the Court explicitly rejected *Fay*. Cause and prejudice was developed as the standard to be met in order to get through the door of the federal court when a petitioner has violated state *procedural rules* which constitute an adequate and independent ground for action by a state court.

Sykes was concerned with procedural trial level rules. Sykes had failed to object at trial to admission of a confession. He did not raise any claim regarding the confession on his direct appeal. 433 U.S. at 75. The "crux of the case" was described by the Court as:

> Shall the rule of *Francis v. Henderson*, *supra*, barring federal habeas review absent a showing of "cause" and "prejudice" attendant to a state procedural waiver, be applied to a waived objection to the admission of a confession at trial?

433 U.S. at 87.

[19] *Sykes* involved the waiver/procedural default aspect of habeas corpus procedure on which the Court has ruled for decades without guidance from Congress. *See, e.g., Brown v. Allen*, 344 U.S. 443 (1953); *Fay v. Noia*, 372 U.S. 391 (1963).

The Court's analysis of the question it had defined focused on the importance of such a procedural rule to the trial of a criminal case. Such rules "may lead to the exclusion of the evidence," promoting finality or acquittal; it may improve the trial process by forcing prosecutors to more fully evaluate their cases; it enables the making of a record with recollections at their freshest; failure to observe such rules detracts from the importance of a "trial" as a "decisive and portentous event." 433 U.S. at 88-91.

Subsequent to *Sykes*, the Court extended the procedural default doctrine beyond the trial stage. The doctrine has, however, continued to be rooted in violations of a state's procedural rules. *See Engle v. Isaac*, 456 U.S. 107, 129 (1982). When a state has established rules whose violation can provide an independent ground to sustain a judgment, principles of federalism and comity are implicated. In the absence of such a violation, the balance is different.

2. *Coleman v. Thompson.*

The most recent decision which discussed the federal/state balance, *Coleman v. Thompson*, 115 L.Ed.2d 640 (1991), further supports the view that cause and prejudice should be limited to procedural default situations. Coleman failed to comply with the Virginia Supreme Court Rule regarding the time for filing a notice of appeal. The Court held that his failure to comply with the Supreme Court Rule constituted an independent state ground for refusal of the federal courts to consider his claims. 115 L.Ed.2d at 663. From the outset the analysis focused on the "respect federal courts owe the States and the States' *procedural rules*. . . ." *Id.* at 654 (emphasis added). The Court noted that certiorari was granted "to resolve several issues concerning the relationship between *state procedural defaults* and federal habeas review. . . ." *Id.* 111 S.Ct. at 2553, 115 L.Ed.2d at 655 (emphasis added).

Coleman reiterated that the basis of the cause and prejudice inquiry is the principle of federalism that an adequate and independent state ground for a state decision should foreclose federal review. *Id.* at 655.

> We have applied the independent and adequate state ground doctrine . . . in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. The doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to *meet a state procedural requirement*. In these cases, the state court judgment rests on independent and adequate *state procedural grounds*. (emphasis added)

Id. at 656. Application of the adequate and independent state ground doctrine is important to concerns of comity and federalism, in part because it promotes the states' interests in enforcing their laws. *Id.* at 656.

In *Coleman*, the Court noted the relationship between the adequate and independent state ground doctrine and that of exhaustion. When a procedural default has occurred, a high bar to federal consideration of the defaulted claim is important to ensure that the doctrine of exhaustion is not circumvented. *Id.* at 656-657.

The desirability of restraint in holding hearings by the federal courts diminishes once the exhaustion requirement is met if there has been compliance with other procedural rules. *See Picard.* This standard strikes an appropriate balance between the interests of the states and the responsibilities of the federal courts.

After concluding its analysis of the nature of a state court ruling which will preclude federal review, the *Coleman* opinion turned to the question of the showing a petitioner must make in order to overcome the state's ruling. That discussion provides further support for Mr. Tamayo-Reyes' position.

The analysis refocused on the importance of promoting state procedural rules and the states' efforts to enforce their laws. First, the Court noted that *Fay* dealt with a procedural default. *Sykes*, 115 L.Ed.2d at 665. The opinion then noted that decisions subsequent to *Fay* analyzed factors in the federalism calculus differently and concluded that *Fay's* deliberate bypass test did not provide sufficient deference to the interests of the states. All of the decisions, however, in which the cause and prejudice test were applied, involved situations in which a petitioner had violated a state's rules and committed a procedural default.[20] *Id.* at 666-668.

The conclusion reached by the Court, that the cause and prejudice standard should be applied when a habeas petitioner had entirely lost his right to appeal, was expressly based on the need for the federal courts to respect state procedural rules. *Fay* was rejected because it "was based on a conception of federal/state relations that undervalued the importance of *state procedural rules*." *Sykes*, 115 L.Ed.2d at 669. (emphasis added).[21]

3. *The state pushes its reliance on Brown v. Allen too far.*

The state's argument that *Brown* and *Salinger v. Loisel*, 265 U.S. 224 (1923), recognize that cause and prejudice should apply to both the successive petition question and

---

[20] The second decision discussed by the Court in *Coleman, Davis v. United States, supra,* involved violation of a federal procedural rule which included a specific waiver provision. 116 L.Ed.2d at 666.

[21] In this regard it is important to note that in his concurrence in *Wainwright v. Sykes,* Justice White concluded:

> With respect to the necessity to show cause for noncompliance with the state rule, I think the deliberate bypass rule of *Fay v. Noia* affords adequate protection to the state's interest in insisting that defendants not flout the rules of evidence.

433 U.S. at 98 (concurring). While Justice White's definition of cause was not accepted in the *Coleman* situation, it is applicable here.

questions about evidentiary hearings misreads the opinions. (*See* Pet. Br. at 18). When the Court in *Brown* stated: "That principle is also applicable to state prisoners," 344 U.S. at 463, it was not holding that the same standard should apply to the holding of evidentiary hearings and successive petitions. The Court was, rather, noting that in *Salinger* it had held that a petition for writ of habeas corpus filed by a federal prisoner could be denied on the ground that it was a second filing. The passage in *Brown* to which the state refers merely extended that principle to a second federal habeas corpus petition filed by a state prisoner.

This is made clear by the *Brown* Court's reference to *Darr v. Burford*, 339 U.S. 200 (1950) immediately following the paragraph quoted by the state. The pages to which the *Brown* Court referred contain a discussion of the effect of a prior denial of certiorari and conclude:

> All the authorities agree that *res judicata* does not apply to applications for habeas corpus. The courts must be kept open to guard against injustice through judicial error. Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner.

339 U.S. at 214-215. Immediately after the reference to *Darr v. Burford*, the *Brown* Court turned to a discussion of when a federal evidentiary hearing should be held. The Court noted that a federal court may decline to hold a hearing if it is satisfied that the state record is adequate:

> However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution.

344 U.S. at 463-464. The Court cited to *Moore v. Dempsey, supra,* and in a footnote a series of cases including *Darr v. Burford, supra,* and *Salinger v. Loisel, supra.*

It should finally be noted that the state fails to mention that in the consolidated *Brown* cases, the federal district courts held several extensive evidentiary hearings. 344 U.S. at 453, 478.

4. *Conclusion.*

The decisions of the Court make it abundantly clear that in the absence of an independent state procedural or substantive ground for a decision, the federalism concerns which motivate the Court to preclude review are diminished. The concerns which lead the Court to replace the *Fay* "deliberate bypass" standard with the *Sykes* "cause and prejudice" standard are not present. *See, e.g., James v. Kentucky*, 466 U.S. 341, 348 (1984); *County Court of Ulster County v. Allen*, 442 U.S. 140, 150-151 (1979).

The state's brief ignores these important distinctions. While permitting a habeas petitioner to adduce facts at a federal hearing does undermine interests in finality (pet. br. at 16), the desire to promote finality is but one factor in the federalism equation. Deference to a state's laws is a separate factor which tips the scales further on the side of deference to state interests. As noted in *Coleman*:

> [f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. . . . These costs are *particularly high* . . . when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims. . . . (emphasis added).

115 L.Ed.2d at 668 (internal quotations omitted).

The state's suggestion that *Townsend* requires that the same standard should be applied when a procedural default occurs and when a petitioner seeks to offer evidence at a habeas hearing ignores some of the developments in the law since *Townsend* was decided. That opinion concluded that the deliberate bypass test provided ade-

quate protection to legitimate state interests. 372 U.S. at 317. It did not hold, as the state suggests, that the two issues must be governed by the same standard.

Since *Townsend*, the Court has developed its analysis of the standards to be employed in the context of default on procedural rules. Its assessment of the state/federal balance has occurred in that context. The analysis has not addressed the different interests at stake when no procedural rule has been violated. Because the interests of the federal and state governments are different when the issue is one of presentation of evidence on a claim which the federal courts are considering, application of a different standard is appropriate.

B. The Federal/State Interests at Stake in this Case.

Much of the habeas corpus caselaw reflects the tension between state and federal interests. That tension has been resolved in favor of the states in a number of decisions in recent years. This case presents a number of factors which were not discussed in the earlier cases, are not discussed in the state's brief, and which weigh on the side of federal evidentiary hearings.

1. *The Integrity of the Federal Judicial Process.*

Questions about the relative weight to be accorded the interests of the states and the federal government arise at several different points in the habeas corpus process. The state's brief ignores the important differences in interests which arise at the different stages.

The question of whether a petitioner should be permitted to proceed if he has not complied with a state's procedural rules arises when he arrives at the federal courthouse. At that point the federal courts must decide whether to open the door. That question properly gives considerable weight to the interests of the states in finality and compliance with their rules. *See, e.g., Wainwright v. Sykes.* Whether to take evidence during a federal hear-

ing raises entirely different questions. At that stage the door is open. As a result, a decision has already been made that the interest in finality has been overcome by the need to consider the petitioner's claims. At this stage a new and powerful interest comes into play—the interest the federal courts have in controlling their own processes.

While the internal mechanisms of the federal courts, their evidentiary rules and procedures may be of interest to the states, the federal judiciary under our federal system must operate independent of state controls. That the balance must be struck in this manner derives directly from the nature of our government. There is a distinction between deference and subordination.

Hanna v. Plumer, 380 U.S. 460 (1965), underscores the authority which the federal government retains over its judicial processes. In holding that service of process in a civil diversity action is to be made in the manner prescribed in the Federal Rules of Civil Procedure rather than state law, the Court held:

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts. . . . To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the enabling act.

380 U.S. at 472.

Further support for this analysis is found in cases such as *Pusey and Jones v. Hanssen*, 261 U.S. 491, 497-99 (1923) (remedial right to proceed in federal court cannot be enlarged by a state statute) and *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538-39 (1958) (internal citations omitted):

> It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge jury relationship in the federal courts.
> . . .
>
> [S]tate laws cannot alter the essential character or function of a federal court because that function is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court. . . .

The discussion of the relationship between the federal and state governments in *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819), while it involved Congressional power, is applicable to the situation at hand. After resolving that Congress had the power to incorporate a bank, the Court turned to the question of whether Maryland could tax the bank without violating the Constitution. The Court held that it could not. The reasons go to the heart of our federal system and the respect which must be given by the states to federal processes:

> The great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries. . . . There are, 1st. That a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve. 3d. That where this repugnancy exists, that authority which is supreme must control. . . .

17 U.S. at 426.

The rule proposed by the state does not give adequate weight to the interests of the federal judiciary. Under their rule, state law would govern the operation of the

federal courts. Federal law should control federal court processes. The state's proposal should be rejected.

2. *The procedural default rule would upset the statutory scheme adopted by Congress in 1966 and 1976.*

Congress relied on the *Townsend* standard when it drafted the evidentiary rules for habeas corpus hearings. It is entirely likely that Congress would have struck the balance in the hearing process differently had the cause and prejudice standard been applicable to the question of when a hearing should be held. The states have also relied on the existing federal standards in determining how to structure their post-conviction and appellate procedures. The suggestion by the amici that this case does not present a situation in which there are any reliance interests is not well-founded. The Court should not pull the underpinnings from the statutory scheme.

3. *Application of the cause and prejudice standard would virtually eliminate federal habeas corpus review in many situations.*

Application of the cause and prejudice standard proposed by the state in conjunction with the holding in *Coleman* that when there is no constitutional right to counsel, attorney ineffectiveness would not constitute cause for a procedural default could eliminate any possibility of federal habeas review in many situations.[22] Mr.

[22] Mr. Tamayo-Reyes does not concede that he had no right to effective representation on his post-conviction petition. *Coleman* is distinguishable. The proceeding on which the default occurred was not the first opportunity which Coleman had had to challenge the evidentiary rulings he sought to bring into federal court. He defaulted on appeal from a post-conviction proceeding in which he had been given the opportunity to raise his claims. 115 L.Ed.2d at 673. By contrast, the post-conviction proceeding in this case was the *first* opportunity that Mr. Tamayo-Reyes had to challenge the state's failure to provide him with adequate interpreter services so that he could understand the proceedings at which he was convicted. In addition, Oregon has established a system to provide representation for post-conviction petitioners. Having done so, it must ensure that the constitutional rights to counsel, equal protection and due process are not violated. *See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (state must provide due process in a system it creates).

Tamayo-Reyes' case, as do many others, comes to federal court after state post-conviction proceedings. Application of the cause and prejudice standard to his attorney's failings, if they are found to be inadequate but not constitutionally defective, would prevent him from utilizing the full federal habeas processes. The federal court would hear his claim; it would, however, not be able to fairly resolve it.

The rule sought by the state would create the anomalous situation in which a petitioner such as Mr. Tamayo-Reyes could be better off without counsel. If he, as a non-English speaking, unsophisticated and uneducated person, had conducted the proceeding in the state court, cause could be found.

On the other hand, application of *Sykes* to a *pro se* prisoner could be fundamentally unfair. *Sykes* assumes an ongoing state judicial process with rules which can be followed. In many post-conviction proceedings, however, an indigent *pro se* prisoner would be unable to investigate or call witnesses to a courtroom which he might not even see. The rules could not be the same in this situation. *Sykes*, then, would be inapplicable.

4. *A change in the law is not needed to limit federal evidentiary hearings.*

The state suggests that a rule which makes it extremely difficult to obtain evidentiary hearings in habeas cases is necessary because a lesser standard would encourage a myriad of hearings. (Pet. Br. at 13.) That argument has no factual basis.

The *Townsend* standard which the state opposes has been the governing law for nearly three decades, a sig-

nificant period in which to determine whether it encourages disrespect for state interests or generates litigation which unduly burdens the federal courts. The record reveals that no such problem exists. The straw man which the state attempts to set up—wily habeas petitioners finding new evidence in every case to obtain reexamination in federal court—simply has not materialized.

Total filings in habeas corpus cases per state prisoner remained relatively constant from 1945-1962, rose dramatically from 1962-1970, but have *steadily decreased* since then. Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, *supra*, at 162. The decrease since 1970 has been dramatic, from 5.05 filings per every hundred state prisoners in 1970 to 1.85 in 1988. *Id.* The number of evidentiary hearings in habeas corpus has also *declined* significantly since the mid-1960's, that is since *Townsend*. *Id.* at 166. The number decreased from 11.03 percent of the cases in 1965 to only 1.11 percent in 1988. Viewed from a different perspective, the number of hearings per filing in habeas corpus cases is far smaller than the number of trials in other civil cases which fell from 11.6 percent in 1965 to 5.03 percent in 1988. *Id.* at 167.

In the face of these numbers, it is difficult to give credence to the claim that the federal courts are regularly interfering with the states and undermining their interests in finality of their judgments and their own processes. The existing standards which the state opposes place significant restrictions on habeas corpus hearings, give considerable deference to state interests, and have not lead to a significant number of hearings.

5. *Federal evidentiary hearings involve a number of issues which cannot be considered under the cause and prejudice rubric.*

Habeas hearings can involve several distinct issues. At times, such a hearing would be devoted to consideration

of the substantive issue on which a petitioner seeks relief. This is the situation in Mr. Tamayo-Reyes' case. At other times, however, a habeas hearing is devoted to consideration of whether a claim was defaulted, or whether cause and prejudice exists for such a default. *See Buffalo v. Sunn*, 854 F.2d 1158 (9th Cir. 1988). These distinctions must be accommodated in the exposition of a rule regarding the right to a hearing. Cause and prejudice is inapplicable to consideration of purely federal procedural issues.

In addition, the desire to present facts in a federal hearing will follow a wide variety of circumstances. The situation present in this case, a federal evidentiary hearing after a state post-conviction proceeding with inadequate counsel, is only one such possibility. A federal evidentiary hearing may be desired when a claim has been exhausted on direct appeal without any post-conviction process. In some states, post-conviction proceedings may be initiated at the appellate, rather than trial, level. *See* Wash. R. App. P. 16.5; *Ylst v. Nunnemaker*, 115 L.Ed.2d 706 (1991). Factual development may not be permitted in some such situations. In some states no counsel is made available to a post-conviction petitioner and the prisoner is not permitted to investigate outside the prison walls. *See Murray v. Giarratano*, 492 U.S. 1 (1989).

Transplanting the *Sykes* "cause" rule onto these widely varying circumstances will not simplify the law or limit litigation. Federal review will be undertaken whether or not *Sykes* is applicable to the question of whether a hearing should be held. Litigation would be shifted from the merits to questions of procedure. The rule proposed by the state would only limit the independence of the federal judiciary.

6. *Just punishment is important.*

The Court's discussions of the importance of finality have focussed on the needs of both society and defendants

for closure in criminal proceedings. These are unquestionably important concerns.

Just punishment is, however, critical both to society and people convicted of crime. If questions exist about the fairness of punishment, the entire body politic is degraded and dehumanized. *See Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (aim of punishment must be to "protect the dignity of society itself from the barbarity of exacting mindless vengeance").

For the defendant, fairness is critical to the effectiveness and propriety of punishment and the attitude with which a person will return to society. When we treat a person with dignity and respect in the criminal justice system, we start the process of reintegration into society and lay the groundwork for acceptance of the punishment. The importance to society as a whole of treating criminal defendants with respect and dignity is undervalued in the state's argument.

7. *Habeas corpus remains an important remedy for review of constitutional violations.*

While the states contend that they have improved their record of observance of federal constitutional rights in the past three decades, the evidence suggests that a role continues to exist for federal review through the habeas corpus processes. The number of reversals in certain classes of habeas corpus cases is alarmingly high. Fully 70 percent of death penalty habeas corpus cases decided in the period 1976-1983 resulted in vacation of the sentence or judgment. *See Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J. Dissenting). Other, more recent statistics place the rate at which relief is granted near 50 percent. *See*, Kathleen Pitchel, *The New Habeas*, 42 Hastings L.J. 939, 1038 fn 551 (1991). That record suggests that at least some state courts remain insensitive to federal constitutional rights. Fairness dictates that the federal courthouse door remain open.

8. *The cause and prejudice standard would discourage the states from establishing effective post-conviction procedures.*

Application of the cause and prejudice rule would encourage the states to engage in the type of conduct which this Court has called "sandbagging" by defense counsel. *See Wainwright v. Sykes*, 433 U.S. at 89. If the states know that they can insulate the decisions of their courts from federal habeas review by establishing systems which provide ineffective representation, there would be little incentive to improve the quality of those systems.[23]

V. THE JUDGMENT OF THE NINTH CIRCUIT SHOULD BE AFFIRMED.

A. Under the Applicable Standards, Mr. Tamayo-Reyes Is Entitled to an Evidentiary Hearing.

Judge Trott correctly found that material facts which are necessary to a proper resolution of Mr. Tamayo-Reyes' claims were not adequately presented to the state court. The requirements for an evidentiary hearing under the fifth subsection of *Townsend* were met. Under sub-

---

[23] Deliberately creating a system which provides inadequate counsel might be found to violate the due process clause. As the decision in *Coleman v. Thompson* reveals, however, it is extremely difficult to prove that type of conduct.

Examination of the system of post-conviction relief in Oregon might very well reveal significant problems. While counsel is made available to the petitioners, the resources expended are generally inadequate. The standard fee is roughly $500.00 to $650.00 per case, depending on whether the attorney handling the case is acting under contract or on an appointed basis. Telephone interview with Ann Christian, Oregon State Court Administrator (December 17, 1991). Petitions are "rarely" resolved with live testimony. Discussions with a member of the Oregon Judiciary indicates that roughly 2-3% of post-conviction petitions are decided in petitioner's favor, and live testimony is taken in even fewer instances. Telephone interviw with Judge G. Barber, Marion County, Oregon Circuit Court Judge (December 17, 1991) (Judge Barber handles a large majority of the post-conviction petitions in Oregon).

section (d)(3) of § 2254, the presumption of correctness was overcome. Mr. Tamayo-Reyes fairly presented his claims to the state court. As stated in *Vasquez v. Hillery*:

> We have never held that presentation of additional facts to the district court, pursuant to that court's directions, evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state court.

474 U.S. 254, 257-258. Judge Trott here, as was the district court in *Vasquez v. Hillery*:

> was evidently motivated by a responsible concern that [the district court] provide the meaningful federal review of constitutional claims that the writ of habeas corpus has contemplated throughout its history.

474 U.S. at 260. *Vasquez v. Hillery* and *McCleskey v. Kemp* are indistinguishable. A federal evidentiary hearing is mandatory.

B. Mr. Tamayo-Reyes Did Not Engage in a Procedural Default.

The state court addressed the merits of Mr. Tamayo-Reyes' federal constitutional claim. No state procedural bar precluded such consideration.[24] The foundation requirement for application of the cause and prejudice standard is absent because the finding of the state post-conviction court does not rest on any adequate or independent state ground.

In addition, the record of the state post-conviction proceeding reveals that Mr. Tamayo-Reyes did not violate any state rules. He did not fail to comply with any notice or filing requirement, contemporaneous objection rule, or any of the other rules which this Court has considered sufficient to constitute a bar to federal consideration of a state prisoner's claim.

---

[24] Oregon has adopted both *Fay* and *Townsend*. *See Church v. Gladden*, 244 Or. 308, 312, 417 P.2d 993, 996 (1966).

The Ninth Circuit correctly found that Mr. Tamayo-Reyes did not engage in a deliberate bypass of the state proceedings. In these circumstances, a federal habeas corpus hearing is mandatory.

C. The Judgment Should Be Affirmed Even if the Court Adopts the Cause and Prejudice Standard.

In the circumstances of this case, the judgment of the Ninth Circuit should be affirmed regardless of the standard employed. Any inadequacy in presentation of the material facts was the fault of Mr. Tamayo-Reyes' post-conviction counsel. Under the peculiar facts of this case, Mr. Tamayo-Reyes cannot be bound by those failings.

The failure of counsel to offer expert testimony, or even a Spanish dictionary, fell below the level of representation required by the Sixth Amendment. The quality of the interpretation was the only issue in the post-conviction proceeding. That quality could not be measured without some evidence to which the court could refer.

The affidavit from the expert hired in the federal court and reference to standard Spanish dictionaries show that Mr. Tamayo-Reyes was prejudiced by his counsel's failings. The interpretation was clearly deficient. He did not understand the mental element of the charge or that he was found guilty.

The ineffective representation constitutes cause in this case because the state post-conviction proceeding was the first opportunity which Mr. Tamayo-Reyes had to present that claim. Moreover, the state was obligated to provide constitutionality competent counsel once it established a system for counsel in post-conviction proceedings. *See supra* pp. 40-41 fn. 22.

A hearing is particularly important in this case because it involves a habeas petitioner who may well be factually innocent. *See Murray v. Carrier*, 477 U.S. 478, 495-496 (1986). Mr. Tamayo-Reyes never admitted his

guilt. The record reveals that he believed he would have a trial. The plea petition shows a potential mental state defense. The state record also shows a potential defense of self-defense. The whole point of Mr. Tamayo-Reyes' presentation in the state court and his efforts in the federal court was to establish his claim that he was found guilty of an offense of which he is innocent and that, when he was taken through a no contest plea, he thought he was invoking the right to present witnesses who could have proved his case.

The findings in the state court are clearly and convincingly wrong. This case presents the rare circumstances in which a federal hearing should be held, even under a cause and prejudice standard.

The appropriateness of a hearing in this case is further supported by the fact that the failing in the first instance was the *state court's*, not the prosecutor's, counsel's nor Mr. Tamayo-Reyes'. The state trial court had the obligation to ensure that Mr. Tamayo-Reyes was provided with an interpreter who would properly translate for him. *See* Or. Evid. Code 604 (Or. Rev. Stat. § 40.325) (Interpreter required in court proceedings for "handicapped person" which term is defined to mean "a person who cannot readily understand or communicate in the English language." OEC 604(6)(a) (ORS 40.325(6)(a)). It did not do so. The state appeals in this proceeding with unclean hands. *See, Sanders v. United States*, 373 U.S. at 17 (habeas corpus is an equitable remedy).

The failing is of the most fundamental nature, affecting the very integrity of the process which led to Mr. Tamayo-Reyes' conviction. The writ of habeas corpus is intended to correct this type of failing in the judicial process.

CONCLUSION

For all the reasons set forth herein, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed and an evidentiary hearing should be held.

Respectfully submitted,

STEVEN T. WAX
Federal Public Defender
851 S.W. Sixth Avenue, Suite 1375
Portland, Oregon 97204
(503) 326-2123
Attorney for Respondent